U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
for Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail and wholesale French food distributing and catering firm. It seeks to employ the beneficiary permanently in the United States as a product distribution manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and denied the petition. On appeal counsel states that the petitioner has substantial assets and gross income, and has previously paid the proffered wage to the beneficiary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 27, 2001. The beneficiary's salary as stated on the labor certification is $17.03 per hour for a 37.5 hour work week or $33,208.50 per year.

The evidence submitted initially and in response to a Request for Evidence issued by the director on October 22, 2002 and a Notice of Intent to Deny issued by the director on May 12, 2003 included the following: a copy of the petitioner's articles of incorporation in California dated January 1, 1982; a copy of an accountant's compilation report dated December 29, 2000; copies of unaudited financial statements of the petitioner dated November 30, 2000 and December 31, 2002; copies of the petitioner's Form 1120S U.S. income tax return for an S corporation for 2000 and 2001; a copy of a letter dated June 11, 2003 from a partner at an accounting firm; an undated affidavit from the petitioner's owner confirming the beneficiary's employment with the petitioner; a copy of a letter dated June 9, 2003 from the petitioner's owner announcing a new restaurant operation of the petitioner; copies of printouts from pages of the petitioner's Internet web site dated July 16, 2002; and copies of statements

for an account at the Bank of America, San Francisco, California, of the beneficiary for the months of March, April and May 2003.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and copies of payroll records for the petitioner dated August 25, 2003. Counsel also submits additional copies of documents previously submitted for the record. The record also contains a letter from counsel dated August 25, 2003 addressed to an official who is identified as being with the "Attorney Liaison Desk," California Service Center. That letter presents in summary form the assertions which counsel makes in his brief in the instant appeal. The brief is also dated August 25, 2003. Attached to the August 25, 2003 letter is a second set of all of the documents submitted on appeal, most of which are themselves copies of documents which were submitted previously. The record therefore contains a total of three copies of most of the evidentiary documents.

On appeal counsel states that the petitioner has substantial assets and gross income, and has previously paid the proffered wage to the beneficiary from June 1993 to the present.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The I-140 petition states in Part 5 that the petitioner was formed in 1981 and employs 105 employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted above, states that where a petitioner employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. Although the petitioner was permitted by this regulation to submit a statement from one of its financial officers in order to establish the petitioner's ability to pay the proffered wage, the petitioner did not do so.

Counsel submitted a letter dated June 11, 2003 from a managing partner at an accounting firm stating the managing partner's opinion that the petitioner has the ability to pay the beneficiary's wages. Counsel asserts in his brief that the managing partner is "the Company's financial officer." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The accountant states that his firm "represents" the petitioner and its owner, but he does not state that he is a financial officer of the petitioner. Nor does any other evidence in the record state that the accountant is a financial officer of the petitioner. Also, the accountant's letter makes no mention of the proffered wage, or of the level of the petitioner's wage. Therefore, for these reasons, the letter from the accountant dated June 11, 2003 fails to satisfy the requirement of the regulation at 8 C.F.R. § 204.5(g)(2) as "a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage."

In the absence of a statement from a financial officer of the petitioner, in determining the petitioner's ability to pay the proffered wage Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

In the present matter, the Form ETA 750B signed by the beneficiary on April 24, 2001 states that the beneficiary worked for the petitioner from June 1993 to October 2000 in the position of Bakery Delivery Sales, and from November 2000 to the present as product distribution manager. An undated letter from the petitioner's owner states the same information about the beneficiary's prior employment with the petitioner. Neither document states the wages received by the beneficiary, nor does that information appear elsewhere in the record. Although counsel states on appeal that the petitioner has paid the proffered wage to the beneficiary since 1993, that statement is supported by no evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Although the record before the director was sufficient to establish that the petitioner previously employed the beneficiary, the evidence on that issue fails to establish the amount of the beneficiary's wages, and it therefore fails to establish the petitioner's ability to pay the proffered wage during the relevant time period.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The record indicates that the petitioner is an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: -$86,692.00 for 2000; and -$41,278.00 for 2001. The figure for 2000 is not directly relevant, because the priority date is in April 2001. The figure for 2001 is relevant to the issue, since that is the year of the priority date, but since the petitioner's ordinary income for 2001 is negative it fails to establish the ability of the petitioner to pay the proffered wage that year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -$232,961.00 for the end of 2000; and -$167,172.00 for the end of 2001. The figure for the end of 2000 is arguably relevant, since the priority date was less than four months later, and the figure for the end of 2001 is for the year of the priority date. But since each of those figures for net current assets is

negative, the petitioner's net current assets also fail to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel also submits copies of an accountant's compilation report and of unaudited financial statements for the petitioner. Accountants' compilations and unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2). That regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

In his decision, the director incorrectly stated that the annual proffered wage is $35,422.00, rather than $33,208.50. The director apparently calculated the annual proffered wage based on an hourly wage of $17.03 for a 40-hour work week, rather than for a 37.5-hour work week as stated on the Form ETA 750. That error, however, did not affect the outcome of the director's decision. The director correctly stated the petitioner's net income for 2000 and 2001 and correctly calculated the year-end net current assets for each of those years. The director correctly concluded that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On appeal counsel submits additional evidence consisting of copies of payroll records for the petitioner dated August 25, 2003. Those records cover only the year 2003, and they therefore provide no additional information on the petitioner's ability to pay the proffered wage in 2001 and 2002. The evidence submitted on appeal therefore fails to overcome the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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